

N.D.A.G. Letter to Ewing (July 10, 1985)

July 10, 1985

Mr. Thomas Ewing
Dodge City Attorney
Ewing Law Office
40 First Avenue West
Dickinson, ND 58601

Dear Mr. Ewing:

Thank you for your letter of June 20, 1985, posing several questions as to the authority of a city to adopt a criminal code and requesting a review of a suspicious advertising scheme.

With respect to the authority of a city to adopt N.D.C.C. Title 12.1 as its own city ordinance, one must recall the established case law holding that cities are mere agencies of the state and have only those powers expressly conferred upon them by the legislative branch of government or those necessarily implied from the powers so expressly granted. State ex rel. Dreyer v. Brekke, 28 N.W.2d 598 (N.D. 1947); Ujka v. Sturdevant, 65 N.W.2d 292 (N.D. 1954). Those powers expressly conferred upon cities may be found in N.D.C.C. §§ 40-05-01, 40-05-02. Several entries are made in both of these statutes providing cities with the authority to adopt an ordinance dealing with subjects which may be covered under our criminal code as found in N.D.C.C. Title 12.1. Those specific subjects include the following:

- Public Peace [N.D.C.C. § 40-05-01(33)]
- Cruelty to Animals [N.D.C.C. § 40-05-01(42)]
- Vagrance and Prostitutes [N.D.C.C. § 40-05-04(43)]
- Traffic Regulation [N.D.C.C. § 40-05-02(14)]
- Driving While Intoxicated [N.D.C.C. § 40-05-02(15)]
- Licensure of Dogs [N.D.C.C. § 40-05-02(22)]
- Assault and Battery [N.D.C.C. § 40-05-02(25)]
- Theft [N.D.C.C. § 40-05-02(26)]
- Marijuana Possession [N.D.C.C. § 40-05-02(30)]

Therefore, the authority of a city to adopt an ordinance covering the statutes as currently found in the state criminal code would only be proper in those instances where the subject matter falls within the express powers provided to a city as found in N.D.C.C. §§ 40-05-01, 40-05-02. The most notable subjects which city ordinances may address are those listed above.

Your letter also questions the authority of the city to enforce the provisions of an ordinance which contravenes or is repugnant to state law. This question appears to be

related to your previous question concerning the authority of a city to adopt the state criminal code.

N.D.C.C. § 12.1-01-05 clearly indicates that no offense defined in N.D.C.C. Title 12.1 or elsewhere may be superseded by any city ordinance, including a home rule city ordinance, and that such offense definition shall have full force and effect within the territorial limits of all cities. The term "offense" is defined to mean conduct for which a term of imprisonment or a fine is authorized by statute following conviction. N.D.C.C. § 12.1-01-04(20). Obviously, no city ordinance may be enforced where the offense defined or provided by that city ordinance supersedes state law as found in the criminal code or anywhere else in the Century Code.

Your next question concerns the enforceability of an ordinance, the title and penalty clause of which has not been published as required by N.D.C.C. § 40-11-06. This particular statute clearly requires the title and penalty clause of every ordinance supposing any penalty, fine, imprisonment, or forfeiture as a violation of its provisions to be published in one issue of the official city newspaper. Use of the word "shall" within this statute by the Legislature is difficult to ignore. Past letters of this office have indicated that ordinances which fall within the category described by this statute and which are not published as required are not enforceable. Given the specific requirement of the Legislature, I have no option but to agree with this conclusion.

Your last question requests our review of an advertising scheme and its legality under N.D.C.C. § 51-16-01. The advertising scheme described in the material enclosed with your letter apparently involves the enlistment of additional members in a sales organization thus resulting in increased income for those causing the enlistment of such additional members. The statutes you make reference to prohibits referral and chain referral selling within the state and provides a class C felony for violations of these provisions. The statute also prohibits those plans which are known as "pyramid sales" or "multi-level distributorships."

However, I am aware that this statute has been interpreted by prosecutors to prohibit such pyramid sales or multilevel distributorships only where it is shown that the primary function of the sales entity is the additional enlistment of members as opposed to the sale of products to consumers. Thus, under this interpretation the fact that additional members may be enlisted by participants and that participants will receive monetary benefit from such action has not caused immediate prosecution of those who operate such a scheme where it can be shown that the primary function of the scheme involves sales of products to consumers. It is interesting to note in the materials enclosed with your letter the following statements as to the legality of this particular multi-level program.

This membership drive is classified as multi-level program and does not fall under the category of pyramid selling.

. . . Product sales using a multiple network of distributors is a primary function of Future.

This is not to suggest that entities engaging in pyramid sales are not immune from prosecution in accordance with N.D.C.C. Ch. 51-16 where their primary function is the sale of certain products. I do, however, want to let you know of this viewpoint should you wish to refer this matter to the attention of the appropriate prosecuting official.

As violations of N.D.C.C. § 51-16-01 are criminal offenses and as prosecutors are in a better position to review the respective facts of multi-level sales arrangements, it seems to me that a formal opinion is not appropriate upon such a question of fact. Instead, I can only recommend that the facts concerning this advertising brochure be examined by the state's attorney to determine whether or not this statute has indeed been violated.

Sincerely,

Nicholas J. Spaeth

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